**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OKLAHOMA**

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| State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma,<br><br>Plaintiffs,<br><br>v.<br><br>Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc., and Willow Brook Foods, Inc.,<br><br>Defendants. | 05-CV-0329 GKF-SAJ<br><br>**THE CARGILL DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE OR EXTEND RESPONSE DEADLINE (DKT. NO. 1380)** |

Defendants Cargill, Inc. and Cargill Turkey Production, LLC (the "Cargill Defendants") offer this Reply in support of Defendants' Motion to Strike or Extend Response Deadline (Dkt. No. 1380), which the Cargill Defendants have joined.

## I. There Is No Emergency.

The premise of Plaintiffs' proposed briefing and hearing schedule—that an "emergency" public health threat justifies a highly accelerated hearing—simply does not bear scrutiny.

**The facts show no "emergency."** The facts here suggest no "emergency" that would justify the rushed hearing of Plaintiffs' motion to forcibly shut down a longstanding, state-approved fertilizer program covering an entire million-acre watershed. Despite the decades-long history of the land application program, Plaintiffs acknowledge that they cannot point to a single instance of any human health effect resulting from the land application of poultry litter, much less any adverse effect resulting specifically from human exposure to bacteria from poultry litter, the subject of Plaintiffs' current motion. (See Dkt. No. 1379-2: Pls.' Mar. 16, 2007 Supplemental Resp. to Def. Simmons Interrog. No. 5: "At the present time, the State has not confirmed the identity of any person who has suffered adverse health effects traceable to water contact in the Illinois River Watershed caused by land application of poultry waste.") On the contrary, the amount of poultry litter land applied in the IRW has actually decreased in the last several years. (See, e.g., Ex. 1: Aug. 21, 2007 S. Patrick Dep. Tr. at 200-01 (discussing BMPs, Inc. program moving litter out of IRW).)

**Plaintiffs base their "emergency" on information they have had for months.** Plaintiffs' implication that their preliminary injunction ("PI") motion results from new information lacks credibility. The motion repeats the same allegations that Plaintiffs made in their complaint two and a half years ago (First Am. Comp. ¶¶ 95-96: Dkt No. 18-1) and cites

information that Plaintiffs have had for many months. (See, e.g., Feb. 15, 2007 Hr'g Tr.: Dkt. No. 1073 at 183 (representing that "While it will be supplemented some, [the scientific data is] substantially complete.").) Indeed, Plaintiffs' supposed "emergency" here is exactly the same "emergency" that Plaintiffs used to justify their motion for expedited discovery 21 months ago. (See Pls.' Mot. for Leave to Conduct Expedited Discovery: Dkt. No. 210 at 9, ¶ 15 ("... Oklahoma's scientific investigation has revealed that the water in the IRW contains levels of bacteria which pose a danger to human health from primary body contact.").) The State itself recently noted in another case before this Court that a claim of "exigent circumstances" is undercut and a preliminary injunction is "inappropriate" where the moving party relies on information known to it for many months.[1] The Court should recognize that same proposition here.

**The State of Oklahoma already has the means to address any true emergency.** Assuming *arguendo* that Plaintiffs' fabricated emergency were real, Oklahoma state law already provides both the Departments of Environmental Quality and Health with a full complement of remedies to address any true public health or environmental emergency that might arise, whatever the source. For example:

> Whenever [ODEQ] finds that an emergency exists requiring immediate action to protect the public health or welfare or the environment, the Executive Director may without notice or hearing issue an order, effective upon issuance, reciting the existence of such an emergency and requiring that such action be taken as deemed necessary to meet the emergency. Any person to whom such an order is directed shall comply therewith...

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[1] See Ex. 2: Okla.'s Obj. to Pl.'s Mot. for Prelim. Injunction: Dkt No. 113 at 4 in United States v. Oklahoma, No. 06-CV-673-GKF-FHM:

> "DOJ now pursues a preliminary injunction citing exigent circumstances which it has been aware of for years in certain instances—more than two years after its 'findings' letter; more than one and one-half (1 1/2) years after its first site visit; and eight (8) months after filing its lawsuit. The relief is inappropriate."

27A Okla. Stat. § 2-3-502(E); see also 63 Okla. Stat. § 1-106 (granting State Commissioner of Health the power to "abate any nuisance affecting injuriously the health of the public or any community"). Thus, if an "emergency" truly exists, the State of Oklahoma has already granted the state agencies with the necessary expertise all the power they might need to take "immediate action." As Plaintiffs have repeatedly emphasized, the State and all of its agencies are the Plaintiffs in this case. Plaintiffs are thus asking the Court to use its extraordinary power of injunction to do something Plaintiffs can easily do for themselves. Nothing justifies Plaintiffs' attempt to rush this Court to a judgment when they actually have the administrative means to address true emergencies, but have chosen not to do so here.

**The State's own agencies see no emergency.** Plaintiffs' submissions notably omit any expression of concern or urgency about the continuing land application of poultry litter from any state regulator or state agency with relevant expertise (e.g., the Oklahoma Departments of Health; Environmental Quality; and Agriculture, Food, & Forestry). The affidavits on which Plaintiffs rest their PI motion come without exception from outside experts Plaintiffs hired especially to create opinions for this lawsuit. If the land application of litter actually posed the "urgent" threat to public health that Plaintiffs urge, one would certainly expect ODEQ, ODAFF, or the DOH to lead the charge against it. These agencies are unaccountably mute, however, both in Plaintiffs' motion and in the agencies' own discovery responses to date. Indeed, the State of Oklahoma (through ODAFF) continues to issue permits approving the very land applications that the Plaintiffs' motion seeks to halt. In a nutshell, the supposed health "emergency" appears to have been fabricated by the State's contingent-fee outside counsel and their hired experts.

**The Plaintiffs' motion here turns the usual RCRA citizen suit on its head.** The ordinary RCRA citizen suit involves a private plaintiff seeking judicial intervention because a

government body has failed to act to halt pollution. See, e.g., 42 U.S.C. § 6972(b)(2)(A)(i) & (ii) (requiring 90 days notice to EPA and to state involved before citizen may commence suit). In contrast, here, it is the State that asks the Court to step in to address an "emergency" that the State already has the power to address. The Attorney General has apparently been unable to convince the State's own expert regulators that any urgency exists, and instead asks this Court to intervene to address an "emergency" that the State's agencies do not recognize.

## II. Plaintiffs Have Failed to Provide Critical Information Underlying the Experts' Affidavits.

The lack of prior disclosure and the omission of critical information about the basis for Plaintiffs' motion weighs heavily against Plaintiffs' proposed truncated motion schedule.

**All of Plaintiffs' expert opinions are new.** Plaintiffs had not previously designated as testifying witnesses any of the experts whose affidavits underlie the PI motion, and Defendants were unaware even of the existence or identity of six of the nine. The opinions of these new experts are of course new to Defendants, as is much of the incomplete data on which the experts appear to rely. Moreover, Plaintiffs only recently admitted that they have no direct evidence of wrongdoing by any Defendant and conceded that they intend to prove liability, causation, and injury through expert testimony. (E.g., Dkt. Nos. 1234 at 4-5; 1272 at 8; see also Sept. 28 Hr'g Tr.: Dkt. No. 1283 at 18 ("[W]e're not relying on direct evidence. . . . [O]ur case is circumstantial . . . .").) Plaintiffs' entire case rests on these experts, and, in a very real sense, the PI motion is the first genuine glimpse the Defendants have had of that case.

**Plaintiffs' experts' analysis is conclusory and incomplete.** The expert affidavits on which Plaintiffs rest their motion offer a brief explanation of the expert's background and claimed expertise, bald assertions of alleged "facts", and conclusory opinions with absolutely no citation to the data or information relied upon to form those conclusions. These omissions render

the affidavits difficult even to understand, much less analyze, test, and rebut. (See Ex. 3: Affidavit of Mansour Samadpour.) To highlight a handful of examples:

- Dr. Fisher makes the blanket assertion that the "fate and transport of the contaminants of land applied poultry waste has been verified by scientific literature on this subject and by analyses of environmental media taken within the IRW" and concludes that "bacteria present in land disposed poultry waste are transported to surface waters (by runoff during rainfall events) and also infiltrate into ground water within the IRW." (Dkt. No. 1373-6 ¶ 7(d).) Dr. Fischer, however, never cites to whatever literature and analyses supposedly support these conclusions.

- Dr. Fisher abruptly asserts that a pattern of contaminants purportedly seen in Lake Tenkiller sediment cores "are directly related to the changes (growth) in poultry production within the IRW and do not relate to the pattern of cattle production or human population." (Id. ¶ 11.) But Dr. Fischer fails to offer any explanation, analysis, or citation to specific data or information to support his conclusion.

- Dr. Taylor baldly asserts that "the integrator has almost total economic control and determines profitability or lack thereof of the average grow-out operation," then leaps to the even more extreme conclusion that "the integrator effectively makes the decision that determines whether growers have sufficient income to properly manage and dispose of waste products." (Dkt. No. 1373-8 ¶ 20.) Dr. Taylor provides no citation to any data supporting these assertions.

- Dr. Caneday unfairly generalizes that "most of the non-floaters practice minimal personal hygiene during their visits to the [Illinois] river" (Dkt. No. 1373-5 ¶ 15), but offers no citation for this alleged "fact."

As these examples demonstrate, the affidavits provide nowhere near sufficient information for Defendants to adequately defend against the experts' ultimate assertions.

**Plaintiffs have not produced the critical data on which their experts rely.** Plaintiffs' submissions omit even the limited data that their experts' affidavits vaguely or implicitly reference. To cite just a few examples, Plaintiffs have failed to produce:

- The historical data regarding cattle, humans, and poultry growth noted in Dr. Fisher's affidavit. (Dkt. No. 1373-6 ¶ 11.)

- A complete set of the data for 2003-2007 regarding IRW floaters and visitors mentioned by Dr. Caneday. (Dkt. No. 1373-5 ¶ 11.)

- The unspecified historical bacteria data regarding impairments noted by Dr. Teaf. (Dkt. No. 1373-7 ¶ 9.)

- The ODAFF records for calculating "waste disposal" locations referenced by Dr. Engel. (Dkt. No. 1373-16 ¶ 4.)

- The actual number of reportable diseases in Adair County or the underlying reports of these alleged incidences. (Dkt. No. 1373-7 ¶ 19.)

- The data set Dr. Olsen used to conduct the "signature" analysis he claims to have done (Dkt. No. 1373-18 ¶¶ 4-9), and which apparently forms the basis of other expert opinions such as those of Dr. Teaf (see Dkt. No. 1373-7 ¶ 17).[2]

To evaluate and test the conclusions reached by Plaintiffs' experts, Defendants must be able to run their own analyses on the *same* data sets. Plaintiffs must both point to the specific produced data sets that were utilized by the experts, and immediately produce all the utilized data not yet disclosed to Defendants.

**Plaintiffs have not produced other potentially relevant data.** On January 5, 2007, the Court ordered Plaintiffs to produce by February 1 the data, testing, sampling, and results that Plaintiffs had gathered, emphasizing that "the information is vital to Defendants' defense." (Dkt. No. 1016 at 8.) Throughout much of the past year, the Defendants have been trying to pry that data from Plaintiffs' attorneys, with only partial success. (See Exs. 4 & 5: R. George letters of Aug. 29 and Nov. 30, 2007.) Despite these efforts, Plaintiffs have still failed to provide a substantial portion of this data. For example, Plaintiffs appear to have provided only summaries of their DNA/Microbial Source Tracking data (as opposed to a complete set of the data

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[2] Notably, Dr. Olsen does not even state what methodology he employed to conduct his analysis. Rather, Dr. Teaf's affidavit references the use of a PCA analysis conducted by Dr. Olsen. (Dkt. No. 1373-7 ¶ 17.) Moreover, if a PCA analysis were conducted, the output of that process would be a graph or chart. However, Plaintiffs produced no chart to match Dr. Olsen's analysis, nor did they disclose the actual data relied upon or method used to establish the alleged "signature" for poultry litter.

collected), which is data that may (or may not) have been relied on by Plaintiffs' experts in their affidavits. Plaintiffs have also failed to produce the agricultural census data they now appear to be relying on, despite specific requests that they produce such information.[3] Further, in order to respond to the PI motion, Defendants need all the data Plaintiffs have gathered, not just that portion of the data that Plaintiffs elected to give their experts.

**Plaintiffs refuse to provide any expert disclosures or reports of any kind.** Shortly after Plaintiffs served their PI motion, the Tyson Defendants reminded Plaintiffs of their obligations to answer Tyson's expert interrogatories and the Cargill Defendants expressly demanded Rule 26 expert disclosures concerning the nine experts on whose opinions the preliminary injunction motion depends. (Dkt. No. 1383-3.) After some delay, Plaintiffs finally decided that they would not provide either expert disclosures or expert interrogatory answers, claiming that they had not designated these experts to testify "at trial." (Dkt. No. 1383 at 4-5.)

**Plaintiffs' intransigence will require additional discovery motions.** Despite numerous discovery motions and Orders over the last two years, Plaintiffs have failed to produce the data underlying their PI motion. Now, the positions Plaintiffs have taken with respect to discovery concerning the PI motion will force Defendants into additional discovery motion practice, particularly with respect to Plaintiffs' refusal to provide expert disclosures. Although Defendants' full arguments in support of those anticipated motions is beyond the scope of this memorandum, the facts laid out above show that Defendants have little choice but to resort to

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[3] There are numerous problems with the format and unorganized nature in which Plaintiffs have produced their scientific data. For example, some of the data has been produced in unreadable format. It also appears that the State has assigned multiple identifiers to the same samples, but has failed, despite repeated requests, to produce a key or chart correlating sample numbers used in field notebooks with sample numbers shown on lab reports. (See Ex. 5.)

discovery motions if they hope to have any reasonable opportunity to understand and respond to the expert opinions underlying Plaintiffs' motion. Meet and confer discussions in anticipation of these motions are underway, but any schedule that does not account for the time that these motions will consume is unrealistic.

**Plaintiffs' proposed deposition schedule is unworkable and unfair.** Plaintiffs' November 28, 2007 offer of the depositions of their experts (Dkt. No. 1383-2) does nothing to cure the missing disclosures and data problems. First, Plaintiffs apparently propose that Defendants take these depositions with nothing more than the experts' affidavits as preparation—without expert disclosures, without answers to expert interrogatories, without the experts' files, without even the underlying data. Moreover, Plaintiffs propose to permit depositions of their experts only after Defendants have submitted their responses to Plaintiffs' PI motion, a patently absurd suggestion. (See Dkt. No. 1383 at 2.)

## III. Any Schedule for Addressing Plaintiffs' PI Motion Should Begin Only After Defendants Receive Full Information from Plaintiffs' Experts.

Based on their preliminary reading of Plaintiffs' PI motion and the sketchy affidavits that accompanied it, Defendants' experts advise Defendants that they will need at least three to six months to review, analyze, test, and rebut Plaintiffs' experts' opinions and to draft their own reports. (Ex. 3: Aff. of M. Samadpour ¶¶ 11-12; Ex. 6: Aff. of Del Ehrich ¶ 4.) Moreover, these experts are clear that this time estimate begins only after the experts have received full and complete disclosure of the data and analysis underlying Plaintiffs' experts' opinions. (Ex. 3: ¶¶ 10-11; Ex. 6 ¶ 4.) Once the experts actually see the data that is produced, it is possible that they will need more time to respond, depending among other things on how much data is produced, the format in which the data is produced, and whether additional testing, site visits, and sampling is needed.

Plaintiffs have had years to collect samples, analyze data, and prepare their motion, yet ask the Court to compel Defendants to respond in a mere two months, and based on only fragmentary information. As a threshold matter, Defendants need full disclosure from Plaintiffs of the nature and basis for the nine expert opinions at issue. Defendants then need time to identify and retain additional rebuttal experts, to allow those experts to review and analyze the data and information on which Plaintiffs' experts rely, to perform whatever additional lab testing and site visits and sampling may be necessary, to review any information gained during the depositions of Plaintiffs experts, and to prepare their own rebuttal reports.

In light of these realities, the six-month sequence of deadlines proposed in Tyson's motion is aggressive, but the Cargill Defendants believe that, with good faith efforts on the parts of all parties, such a schedule is possible. The Cargill Defendants note, however, that such a sequence cannot begin until Plaintiffs have disclosed full information concerning their experts and those experts' opinions, a disclosure that has not yet occurred.

**CONCLUSION**

Although Plaintiffs' preliminary injunction motion seeks sweeping relief and asserts astonishing allegations of widespread threats to the health of the people living in the IRW and the health of the IRW itself, the lack of actual support for the allegations borders on recklessness, and their late claims of "emergency" ring hollow. Rather than addressing a genuine "imminent" threat, Plaintiffs' motion for a preliminary injunction and press for quick deliberation appear intended to deny Defendants a fair opportunity to defend against Plaintiffs' allegations. Plaintiffs' motion rests almost entirely on the affidavits of nine hired experts, the research and conclusions of whom will require significant discovery before Defendants can fairly defend against the motion. Further, Plaintiffs must immediately disclose all withheld data. Given these

considerations, the Court should implement a schedule similar to that proposed in Docket No. 1380 at 7-8, and hold an evidentiary hearing no sooner than May 14, 2008.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on the 5th day of December, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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